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Date:

AUGUST 3, 2005

To:

EXAMINER DUC MINH NGUYEN

U.S. PATENT AND TRADEMARK OFFICE

Fax #:

(571) 273-8300

From:

FRANK C. NICHOLAS

Phone #:

(847) 424-2521

Client/Matter No.:

7780/18 (T00349)

of Pages:

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Signature

August 3, 2005

Date

PATENT-APPEAL Case No. 7780/18 (T00349)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re patent application of)
ROBERT J. MENENDEZ) Examiner: NGUYEN, DUC MINH
Serial No.: 10/040,288))) Group Art Unit: 2643
Filed: OCTOBER 25, 2001)
Title: SYSTEM FOR MONITORING)
A SERVICE VEHICLE)

REPLY BRIEF

Commissioner for Patents P O. Box 1450 Alexandria, VA 22202-1450

Sir.

This is a reply brief in response to the Examiner's June 3, 2005 answer on appeal.

August 3, 2005 Case No.: 7780/18 (T00349) Serial No.: 10/040,288 Filed. October 25, 2001

Page 2 of 3

The Examiner's answer fails to address the flaw in his arguments. Indeed, although the Examiner appears to be arguing new grounds of rejection, no new rejections are asserted.

"In order to carry back the 35 U.S.C. 102(e) critical date of the U.S. patent reference to the filing date of a parent application, the parent application must support the invention claimed as required by 35 U.S.C. 112, first paragraph. For if a patent could not theoretically have issued the day the application was filed, it is not entitled to be used against another as 'secret prior art' under 35 U.S.C. 102(e)." MPEP §2136.03 IV.

If any parent of Flick '946 could have been used as an anticipatory reference, the Examiner would have cited that reference instead. Since the Examiner cannot allege, and has not alleged, that Flick '946 could have issued on the date cited by the Examiner, Flick '946 cannot be cited as prior art in support of a §102(e) rejection.

The Examiner cites to the Flick '465 patent in his response. However, this application has never been rejected over the '465 reference. Appellant traverses the Examiner's argument that '465 "clearly" covers every limitation – if it was so clear, the Examiner would have cited '465 in support of a rejection. The '465 patent was issued prior to the '946 reference, and was available to the Examiner during his search and throughout the prosecution of this application. The Examiner did not even mention '465 as relevant to patentability in the Form 892.

The Examiner has continued to reject this application over Flick '946. Therefore, this rejection must fall. Furthermore, the Examiner is only allowed to raise a new ground of rejection in response to a new argument asserted by Appellant – since Appellant has not raised a new ground of rejection on appeal, the Examiner cannot assert a new ground of rejection in the Answer. See, 69 F.R. 155, 49963 (August 12, 2004).

Therefore, Flick '946 cannot support a rejection under §102(e).

August 3, 2005 Case No.. 7780/18 (T00349)

Serial No.: 10/040,288 Filed: October 25, 2001

Page 3 of 3

SUMMARY

The final rejection of claims 1-31 should be reversed.

Dated: August 3, 2005

Respectfully submitted,

ROBERT J. MENENDEZ

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Phone. (847) 905-7111 Fax: (847) 905-7113 Frank C. Nicholas

Registration No. 33,983 Attorney for Applicant